85-1911

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IN THE SUPREME COURT OF
THE UNITED STATES

OCTOBER 1985 TERM

DAVID C. BAILEY,

Petitioner,

v.

MERRILL LYNCH, PIERCE, FENNER &
SMITH, INC., a Corporation,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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QUESTIONS PRESENTED FOR REVIEW

I.

Whether the U. S. Court of Appeals for the Fourth Circuit committed error in this diversity action for wrongful discharge in holding, contrary to clearly established state law, that a North Carolina employee's employment contract, made in North Carolina, which expressly incorporated in it the terms of the employer's policy manual with reference to causes for termination and termination for unsatisfactory performance and which manual provided specific steps to be taken by the employer to terminate an employee for unsatisfactory performance, was terminable at the will of the employer, without a showing of unsatisfactory performance and compliance with the manual procedures for termination?

II.

Whether the U. S. Court of Appeals for the Fourth Circuit has unconstitutionally deprived the Petitioner of his property right in his employment contract in violation ot the Fifth Amendment to the U. S. Constitution by refusing to follow clearly established substantive law of the North Carolina Appellate Courts holding that Petitioner's employment was not terminable at the will of the employer?

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GROUNDS ON WHICH JURISDICTION OF THIS COURT IS INVOKED

(i) The date of the decree sought to be reviewed and the time of its entry was January 14, 1986.

(ii) Petitioner moved for a rehearing, with the suggestion of an en banc, which was denied on March 28, 1986.

(iii) The statutory provision believed to confer on this Court jurisdiction to review the decree in question by writ of certiorari is 28 U.S.C.A., Sec. 1254(1).

STATEMENT OF THE CASE

Plaintiff-Petitioner, hereinafter called Bailey, graduated from the University of North Carolina at Chapel Hill with a degree in journalism. In 1950 he was working for the Asheville Citizen-Times in the News Department, training to become an editor.

In July 1950, he was contacted by Merrill Lynch, the Defendant-Respondent herein, with regard to being employed there. On his first visit he talked with Clyde W. Wright, Office Manager of Merrill Lynch, and he was told by him that "we would have to go strictly by the Manual". Bailey testified that the Manual was variously called "Policy Manual" and "Operations Manual". Bailey asked Wright what job security he would have with Merrill Lynch and he was told by Wright

he would be employed under the terms of the Manual and could be employed and terminated only under the terms of that Manual. In August, 1950, Bailey advised Wright that he would accept the position. Wright told him that he could be fired for cause, such as theft, falsification of records, lying, cheating and refusal to carry out the order of a superior officer. However, Bailey did not start to work in 1950, was not enrolled as an employee and performed no work for Merrill Lynch for the reason that he was called into active duty with his Army Reserve Unit in the Korean War. He was allowed to leave the service on April 1, 1952, the effective date of separation being May 1, 1952. He contact Wright and was told that the job was still open. Wright told him that the Manual was part of his contract

of employment and that he would have job security and could be terminated only under the terms of the Manual.

After completion of New York training, Bailey went to work as a Registered Account Executive in the Asheville office and worked for the firm continuously until 1981, approximately 29 years, and ranked as one of the better producers in the Asheville office.

Bailey married a former employee of Merrill Lynch, who had an EEOC lawsuit pending against Merrill Lynch. While the lawsuit was pending, Mrs. Raye Ann Dorn, an employee of Merrill Lynch, heard Office Manager Frady tell two men in his office that if Bailey did not get his wife to drop her lawsuit, he was going to terminate him,

"It was going to cost Merrill Lynch big bucks."

Bailey's wife did not drop her case and on August 17, 1981 Manager Frady called Bailey into a conference and advised him that he had come to the conclusion that Bailey had suddenly become unprofessional, giving no particulars. Frady then told Bailey that he could remain until his sixtieth (60th) birthday, or until November 1, 1981 and that he had no choice but to let Bailey go on that date or permit him to take early retirement. When Bailey stated, "It looks as though I have no choice in the matter", Frady stated, "That's correct".

Bailey testified that he never had a conference with Frady regarding any unsatisfactory performance, no suggestion from Frady as to how to improve job performance,

no warning from Frady with reference to job performance and no imposition of a probationary period.

Bailey testified that had he continued to work till age 70, which was his intention, he would have earned $616,740. Deducting the retirement benefits of a ten (10) year period and deducting also earnings made by Bailey after his termination, his net damages before commutation to present value would have been $448,667. The jury award was $250,000 of which the trial judge ordered remittitur of $125,000, which Bailey remitted.

By deposition of Joseph Stuart Hume, offered on the trial, there was evidence that as an Assistant Office Manager and Office Manager he was familiar with the Manual in effect in 1952. Hume testified

that he was familiar with the provisions in 1952 dealing with termination for unsatisfactory performance and that the provisions dealing with termination in the 1980 Manual were the same as in 1952 and that both in 1952 and in 1980 Manuals the Manager was required thereby to make every effort to help an employee with his performance to discuss the problems with the employee with his performance, to discuss the problems with the employee, and should explain where improvement is needed and that the employee should be told that failure to correct the problem would lead to termination and provided also that a disciplinary probationary period should be imposed if the problem continued after verbal warning and that a formal memorandum should document fully and objectively the circumstances of the proba-

tion and placed in the employee file with a copy to the employee. He further testified that both Manuals, 1952 and 1980, contained the provisions that if the employee's performance failed to improve during the probationary period he could be terminated for unsatisfactory performance with a written termination report prepared outlining the reasons for termination.

The jury, in its answer to the issues submitted, found that the Manual was expressly made a part of Bailey's contract of employment and further that Merrill Lynch had breached the contract of employment.

The jury awarded Petitioner $250,000 damages for breach of contract of employment which was reduced by remittitur to $125,000. The U. S. Court of Appeals for the Fourth Circuit reversed the lower's Court's Judg-

ment and ordered dismissal of Petitioner's claim.

The basis for federal jurisdiction in the United States District Court for the Western District of North Carolina, the Court of first instance, was complete diversity of citizenship and the fact that the amount in controversy exceeded $10,000.

ARGUMENT

I.

Petitioner relies on Rule 17.1(a) of the Supreme Court Rules as the consideration which should govern the ruling on this Petition for Review on Certiorari, which provides that one of the considerations governing the review on certiorari is when a Federal Court of Appeals has so far departed from the accepted and usual course of judicial proceedings as to call for an exercise of the Supreme Court's power of supervision.

The United States Court of Appeals for the Fourth Circuit has decided the instant case solely on one North Carolina decision, Williams v. Biscuitville, 40 N.C. App. 405, 253 S.E. 2d 18, discr. rev. den., 297 N.C. 459, 256 S.E. 2d 810 (1979) which in the opinion of Petitioner is not in point for

reasons which will hereafter be given, and has chosen to ignore and fail to follow four decisions of the North Carolina Appellate Courts, one of which is completely on all fours with the instant case, namely, Trought v. Richardson, et al, ___ N.C. App. ___, 338 S.E. 2d 617 (1/21/86).

In Biscuitville, supra, at the time the Plaintiff was employed, there was no Personnel Manual. After approximately five years of Plaintiff's employment, a Manual was unilaterally promulgated by the employer. Plaintiff's employment contract with the employer in Biscuitville did not provide that the Personnel Manual was a part of his employment contract, and neither the Manual nor Plaintiff's employment contract provided that the Manual was the exclusive method by which an employee could be terminated. In

the instant case, the employment contract between Petitioner and Respondent, Merrill Lynch, provided that the Manual already in existence, was the sole and only method by which Petitioner could be terminated for unsatisfactory performance. Thus, in the instant case, the Manual, by agreement between employer and employee became part of a bilateral agreement and therefore, as to Petitioner, the Manual could not be unilaterally changed by the employer in regard to its termination provisions, to Petitioner's detriment, because to do so would be a breach of Petitioner's employment contract. For these reasons, the instant case is completely distinguishable from Biscuitville.

The four North Carolina Appellate cases which control the instant case are Griffin v. Housing Authority of the City of Durham,

N. C., 62 N.C. App. 556, 303 S.E. 2d 200 (1983), George v. Wake County Opportunities, Inc., 26 N.C. App. 732, 217 S.E. 2d 218 (1975), Sides v. Duke Hospital, 74 N.C. App. 331, discr. rev. den., 314 N.C. 331 (1985), and Trought v. Richardson, et al, supra.

In Trought, Petitioner has obtained from the Clerk of the North Carolina Court of Appeals a copy of the record. In her complaint, Plaintiff alleged that at the time she became employed at Pitt County Memorial Hospital, the Hospital had adopted a Personnel Manual. She further alleged that she was required to sign a statement that she had read the Hospital Personnel Manual which provided that she could only be discharged for cause and that certain procedures had to be followed in order for her to be discharged. She also alleged that the

statement she signed was to be part of her employment contract and that she was discharged without cause and without following the procedures of the Personnel Manual. The North Carolina Court of Appeals held that Defendants' Motion for Dismissal under Rule 12(b)(6) of the North Carolina Rules of Civil Procedure, that the Plaintiff had sufficiently alleged that the Personnel Manual was a part of her employment contract which was breached by her discharge, to survive the Motion and the Judgment dismissing her wrongful discharge claim was reversed.

It should be mentioned that the brief filed by Defendants in Trought raised the argument that under Biscuitville, cited in Defendant's Brief, the Manual was unilaterally promulgated by the Hospital and that the contract of employment with the Plain-

tiff Trought was terminable at the will of the Hospital. This argument was rejected by the North Carolina Court of Appeals.

The facts alleged in the Trought complaint and the facts in the instant case are identical and the fact that the Court in the Trought case rejected the Biscuitville argument as to the Manual having been unilaterally promulgated indicates that the Court felt that when such a Manual became a part of the employment contract, it ceased to be a unilateral document but instead, became part of a bilateral agreement. This clearly indicates that the U. S. Court of Appeals failed to follow the most recent North Carolina case law.

The next most recent case is that of Sides v. Duke Hospital, et al, supra. In that case, the Plaintiff was persuaded to

change jobs upon express assurances that she could only be discharged for incompetence. The identical assurances were given in the instant case, except that instead of the word, "incompetence", being used, the phrase, "unsatisfactory performance", was used.

In Sides, as well as in the instant case, the assurance that the Plaintiff could only be discharged for incompetence was made a part of her employment contract, as in the instant case. In Sides, Plaintiff was discharged for retaliatory reasons because of her refusal to testify untruthfully or incompletely in a medical malpractice case, a purpose which contravened public policy. In the instant case, Petitioner was discharged for retaliatory reasons for his failure or refusal to make his wife drop her EEOC case

against Merrill Lynch. This, too, contravenes public policy which requires that everyone be given free access to the Courts for redress of wrongs.

In Sides, the Court said that the fact of her reliance on the assurances given and the fact that her discharge was for a reason other than unsatisfactory performance were sufficient to remove her employment contract from the "terminable at will" rule to enable her to sue for breach of her employment contract. In the instant case, Petitioner was persuaded to change employers after years of employment with the Asheville Citizen-Times Publishing Company in a position in which his major, Journalism, could be put to use. He, too, was discharged for retaliatory reasons.

It is Petitioner's opinion that the

Sides case gives four reasons why, under North Carolina, the Plaintiff's contract was not terminable: (1) Plaintiff was assured by Duke that she could only be discharged for incompetence; (2) these assurances induced her to move from Michigan to accept the job offer; (3) were a part of her employment contract and (4) the discharge was retaliatory for refusal to violate public policy.

The other two North Carolina cases referred to above are older cases and give clear indication that Trought and Sides were not a departure from the North Carolina law but were in furtherance of it. In Griffin, supra, the Court stated:

> "Defendants' personnel policies, which were amended after Plaintiff was hired, were not expressly incorporated in Plaintiff's contract, and without such inclusion, Defendant was not obligated to

> follow its personnel policies in dismissing Plaintiff."

The obvious implication of the above statement contained in Griffin is that if the personnel policies were expressly incorporated in the contract of employment, as in the instant case, the employer would be obligated to follow its personnel policies in dismissing the employee.

The oldest of the four cases herein cited is George, supra, wherein the Court said:

> "Although alleged by Plaintiff there is nothing in the record to indicate that the dismissal procedure was incorporated into her contract. Without some such provision, Defendant had the right to dismiss Mrs. George at any time and for any reason."

As pointed out in an annotation contained in 33 ALR 4th 120, the common law rule regarding the termination of an at-will

employee is that if the employment is not for a definite term, and there are no contractual or statutory restrictions on the right of discharge, an employer may lawfully discharge an employee whenever and for whatever cause, without incurring liability for wrongful discharge. The editor of the annotation further states that in keeping with the modern trend of judicial evaluation, a number of jurisdictions have held or recognized that under particular circumstances, the right of an employer to freely discharge an at-will employee may be contractually restricted as a result of the promulgation of corporate employment practices specifying the procedures or grounds for discharge or termination of employees, even though such personnel or policy manuals had not been

expressly incorporated in the employment contracts.

In the opinion of the Fourth Circuit, the Court expressed concern in a footnote that to adopt Bailey's contention that the 1952 Manual was the sole and exclusive method by which Bailey could be terminated could lead to "disastrous results" saying that such an interpretation of the law would mean that employees of Merrill Lynch would be subject to different employment contracts since changes to the Manual occur so often that employees hired on different days would be subject to different Manuals.

This concern by the Court is totally unwarranted. First of all, if Merrill Lynch chose to make such a contract, then it should be held to it, irrespective of its

paper work problems if the Manual were changed with regard to termination.

However, the evidence is clear and uncontradicted that there was absolutely no change in the substance of the termination provisions of the Manual between 1952 and 1981, a period of 29 years and all of the employees hired in that 29 year period would be subject to the same termination provisions.

It should be observed that there is tremendous public interest in the question of discharge of at-will employees, as evidenced by the many newspaper feature stories dealing with the subject and reporting on new case law over the entire United States.

It seems abundantly clear that the U. S. Court of Appeals for the Fourth Circuit chose not to follow North Carolina Appellate

case law in the instant case, even though Briefs and supplementary citations of authority were given to the Court with all of the above North Carolina cases being fully discussed, and the Court either failed to read, or failed to properly read and interpret, these decisions and chose not to follow them.

It is interesting that the panel of the Fourth Circuit Court of Appeals chose to write a Per Curiam opinion and chose to have this opinion unpublished. It would appear that there was neither pride of authorship nor of decision in the rendition of this opinion.

The Rules of Decision Act, 28 U.S.C.A. Sec. 1652 provides that the laws of the several states, except where the Constitution or Treaties of the United States or Acts of

Congress otherwise require or provide shall be regarded as rules of decision in civil actions in the courts of the United States in cases where they apply, and includes not only state statutes, but the unwritten law of a state as pronounced by its courts. The object to be achieved is uniformity of decision within each state; the outcome of litigation with respect to a state-created right should be the same in a federal court as it would be in the state court.

36 CJS 336 Sec. 165(2)

It is respectfully submitted that the U. S. Court of Appeals for the Fourth Circuit has so far departed from the accepted and usual course of judicial proceedings in failing to follow North Carolina state law in this case as to call for an exercise of the power of supervision of the Supreme Court.

II.

As stated in Bishop v. Wood, et al, 426 U.S. 341, 48 L. Ed. 2d 684, 96 S. Ct. 2074 (1976):

> "The N. C. Supreme Court has held that an enforceable expectation of continued public employment in the State can exist only if the employer, by statute or contract, has actually granted some form of guarantee. Still v. Lance, 279 N.C. 254, 182 S.E. 2d 403 (1971)."

Petitioner submits that in his argument under Question I, he has established that his contract of employment embraced and included the Manual and that he could be terminated only in accordance with the Manual for stated causes or for unsatisfactory performance.

In Arnett v. Kennedy, 416 U. S. 134, 40 L. Ed. 2d 15, 94 S. Ct. 1633 (1974), the Supreme Court held that because the employee could only be discharged for cause, he had

property interest which was entitled to constitutional protection.

In other words, since Petitioner could only be discharged for stated causes or for unsatisfactory performance, he has had a property interest which was entitled to the protection of the 5th Amendment to the Constitution of the United States.

The U. S. Court of Appeals for the Fourth Circuit is a part of the government of the United States and if that court wrongfully has deprived Petitioner of his property in his continued employment he is entitled to the protection of the 5th Amendment against such invasion of his property right by the U. S. Court of Appeals for the Fourth Circuit.

In Bishop v. Wood, et al, supra, the U. S. Supreme Court commented upon the weight

which should be given to the interpretation of the law of North Carolina by the U. S. District Court for the Western District of North Carolina.

Not only did the U. S. Court of Appeals for the Fourth Circuit give no weight to the rulings of Judge Woodrow W. Jones of the U. S. District Court for the Western District of North Carolina in the instant case, but it gave little, if any, consideration to the Appellate Court cases cited under Question I.

It is respectfully submitted by Petitioner that the failure of the U. S. Court of Appeals for the Fourth Circuit to follow North Carolina substantive law in this case has had the effect of unconstitutionally depriving Petitioner of his property interest in his continued employment, of which he had

an enforceable expectation, by reversing the U. S. District Court for the Western District of North Carolina and ordering Petitioner's case dismissed.

CONCLUSION

For the reasons set forth above, Petitioner respectfully prays that this Court grant this Petition for Certiorari to review the decision of the U. S. Court of Appeals for the Fourth Circuit.

Respectfully submitted, this 20th day of May, 1986.

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CERTIFICATE OF SERVICE

This is to certify that I have this day served counsel for the opposing party in the foregoing matter with a copy of this pleading by ( ) depositing in the U. S. Postal Service a copy of same in a properly addressed envelope with adequate postage thereon. ( ) leaving same at his office with a responsible partner or employee.

This 20 day of May, 1986

PATLA, STRAUS, ROBINSON & MOORE, P.A.

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APPENDIX

UNPUBLISHED

UNITED STATES COURT OF APPEALS

FOR THE FOURT CIRCUIT

No. 85-1066

David C. Bailey,

Appellee,

versus

Merrill Lynch, Pierce, Fenner & Smith, Inc., a Corporation,

Appellant.

Appeal from the United States District Court for the Western District of North Carolina, at Asheville. Woodrow W. Jones District Judge. (C/A 83-346)

Argued: October 8, 1985 Decided January 14, 1985

Before RUSSELL and SNEEDEN, Circuit Judges, and BOYLE, District Judge for the Eastern

District of North Carolina, sitting by designation.

Richard Sinkfield (Hunter R. Hughes; Rogers & Hardin; William C. Morris, Jr.; Morris, Golding Y. Phillips on brief) for Appellants; Harold K. Bennett (Patla, Straus, Robinson & Moore, P.A. on brief) for Appellee.

PER CURIAM:

Merrill Lynch appeals from a jury verdict favoring a former employee in a breach of employment contract case. The company claims the trial court erred in denying its motions for a directed verdict and for a judgment notwithstanding the jury verdict. Finding that an order granting a judgment notwithstanding the jury verdict would have been appropriate in this instance, we reverse and remand with instructions for the district court to enter a verdict in favor of Merrill Lynch.

I.

David C. Bailey accepted a job with Merrill Lynch in 1950. As a result of his recall into the Army, however, Bailey did not begin working for the company until May of 1952. At that time, a manager at Merrill Lynch told Bailey that he would receive a "permanent, secure position" and that he could be terminated only under the terms of the 1952 employment manual which governed his employment. Joint Appendix at 14. No definite or fixed term of employment was agreed to, however.

Bailey worked for Merrill Lynch continuously until November 1, 1981, when his employment with Merrill Lynch was terminated because his work had "suddenly become unprofessional." Joint Appendix at 25. Since he was fired two months before his sixtieth birthday, Merrill Lynch offered to pay

Bailey two additional months' compensation necessary to complete his eligibility for the Company's early retirement program. Bailey elected to accept the offer and to invoke Merrill Lynch's early retirement plan.

Bailey later filed suit protesting his discharge, however. He contends that the 1952 employment manual is a part of his employment contract because it was expressly incorporated into the contract. The manual requires that before an employee is terminated, he must receive one verbal warning, a probationary period, and a written termination report stating the reason for his termination. Bailey says that since Merrill Lynch failed to follow the procedure outlined in the manual, the company breached his employment contract.

Merrill Lynch moved for a directed verdict at the close of Bailey's case. The motion was denied. The jury subsequently returned a verdict in favor of Bailey, awarding $250,000 in damages for wrongful discharge under the terms of the employment contract.

After the jury returned its verdict in favor of Bailey, Merrill Lynch made a timely motion for a judgment notwithstanding the jury verdict. The district court denied the motion, but ordered a remittur of $125,000 in the damages awarded by the jury.

In ruling on a motion for a judgment notwithstanding the verdict, the trial court must consider the record as a whole and in the light most favorable to the party opposed to the motion. The motion should be granted if there is no substantial opposing

evidence. Evidence is substantial in this respect if it is of such quality and weight that reasonable and fair-minded men in the exercise of impartial judgment could reasonably return a verdict for the nonmoving party. Wyatt v. Interstate & Ocean Transport Co., 623 F.2d 888 (4th Cir. 1980). Merrill Lynch argues that the evidence at trial, viewed in its entirety and in the light most favorable to Bailey would only sustain a finding that Bailey was employed under an employment at will contract. The trial court disagreed and refused to grant Merrill Lynch's motion for a judgment notwithstanding the verdict.

We believe the trial court erred. In North Carolina,[1] contracts that do not con-

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[1] This is a diversity case. We must therefore follow the law of North Carolina concerning employment contracts.

tain a definite or fixed term of employment are deemed employment at will contracts which may be terminated at the will of either the employer or the employee, irrespective of the quality of the performance of the employee. Miller v. Ruth's of North Carolina, 69 N.C. App. 672, 318 S.E.2d 2 (N.C. App. 1984) (employment for an indefinite term is regarded as an employment at will contract that may be terminated at any time by either party to the contract). Furthermore, even if it is expressly incorporated into an employment contract, the manual will not establish the exclusive method by which an employee may be terminated when the employer has the power to unilaterally implement and change it. Williams v. Biscuitville, 40 N.C. App. 405, 253

S.E.2d 18 (App.N.C. 1979), cert. denied, 297 N.C. 459, 256 S.E.2d 810 (1979).

In this case, the evidence at trial showed that the employment manual was implemented solely by Merrill Lynch and was subject to unilateral change by the company at any time. In fact, the Company's Board of Directors amended the manual frequently between 1952 and 1980. Joint Appendix at 101-105.

Under the holding in Biscuitville, the termination procedure outlined in the 1952 employment manual was not the exclusive method for discharging employees because the manual was unilaterally implemented by Merrill Lynch and could be changed by the Company at any time. Therefore, even if the employment manual was expressly incorporated into his contract, Bailey's employment was

terminable at will.[2]

III

The evidence at trial, viewed in its entirety and in the light most favorable to Bailey, was susceptible to only one permissible inference: Bailey's employment contract with Merrill Lynch was an employment at will contract. We find, therefore, that the trial court erred in denying Merrill Lynch's motion for a judgment notwithstand-

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[2] To adopt Bailey's contention that the 1952 manual is the sole and exclusive method by which Bailey could be terminated would lead to disastrous results. Such an interpretation of the law would mean that employees of Merrill Lynch would be subject to different employment contracts since changes to the manual occur so often that employees hired on different days would be subject to different manuals.

ing the verdict. Accordingly, we reverse and remand with instructions for the district court to enter a verdict in favor of Merrill Lynch.

REVERSED AND REMANDED.

FILED
MAR 28 1986
U.S. Court of Appeals
Fourth Circuit

UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

No. 85-1066

David C. Bailey,

Appellee,

versus

Merrill, Lynch, Pierce, Fenner & Smith, Inc., etc.,

Appellant.

Appeal from the United States District Court for the Western District of North Carolina, at Asheville. Woodrow W. Jones, District Judge.

The appellee's petition for rehearing and suggestion for rehearing in banc were submitted to this Court. As no member of the Court requested a poll on the suggestion for rehearing in banc, and

As the panel considered the petition for rehearing and is of the opinion that it should be denied,

IT IS ORDERED that the petition for rehearing and suggestion for rehearing in banc are denied.

Entered at the direction of Judge Russell, with the concurrence of Judge Boyle, United States District Judge sitting by designation.

For the Court,

s/ John M. Greacen
CLERK